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MEMORANDUM

To: Dave McCracken, New 49'er Association

From: James L. Buchal

Date: August 23, 2011

Re: Response to AB 120

AB 120 is the latest in a series of suction dredge mining shutdowns commencing with the July 10, 2009 preliminary injunction entered by Judge Roesch of the Alameda County Superior Court, and then SB 670. There are two primary legal attacks to be made: either (i) the State of California is without power to enact such severe restrictions on the exploitation of federal mining claims by reason of federal law; or (ii) if not preempted by federal law, the actions amount to a "taking" of the mining claims for which compensation must be paid.

The primary difficulty with both arguments is that the State has attempted to create the impression that interference with suction dredge mining is both temporary and not final: temporary in the sense that there is an expiration date for the moratorium, and not final in the sense that the moratorium may end upon the Department of Fish and Game's making required findings.

The Department was, until passage of AB 120, on track to complete its SDEIR and new regulations by about the end of this year. Indeed, their contract with the environmental consultants expires then. AB 120, however, requires two additional steps before the statutory moratorium can be lifted. The Department must certify that the new regulations "fully mitigate all identified significant environmental impacts" and that a "fee structure is in place that will fully cover all costs to the department related to the administration of the program".

The draft SDEIR identifies a number of what it calls "significant and unavoidable" environmental impacts, and takes the position that the Department lacks substantive authority under California law to mitigate these impacts. Assuming the Department adheres to this position, the required certification cannot be made. Discussions with Departmental counsel suggest that the Department is likely to simply finish the EIR. The Department has also indicated that it regards present fees as inadequate, and lacks authority to raise those fees, so that the required certification on fees cannot be made either. For these reasons, unless we successfully overcome the new law with a legal challenge, as a practical matter, AB 120 could operate to shut down suction dredge mining until June 30, 2016.

Any legal action challenging AB 120 will be met with the objection that the claim is not ripe for review unless and until the Department has made, or failed to make, the requisite

certifications. The Department is under a court order to complete the EIR, which will in all likelihood finalize the "significant but unavoidable" conclusions preventing the first certification. The Department is also on record as suggesting that present fees are inadequate. There is a defensible position that it is now obvious the certifications cannot be made, and that there is continuing injury from ongoing delay.

As to the forum for these claims, the federal courts have suggested that so long as state actions are pending, and in particular so long as the preliminary injunction is pending, the claims must be heard in California. It is conceivable that a new set of plaintiffs, not party to any existing case, could get a hearing in federal court on these claims, but more probably than not, the federal district court would decline to hear the case on the ground of the pending state actions. In a world of unlimited litigation resources, one might commence state and federal litigations with two different sets of plaintiffs, particularly given the reasons for pessimism with respect to any immediate progress in the California courts.[1]

As to California courts, the options would appear to be: (1) return to Judge Roesch's courtroom, (2) intervene in PLP's proceedings in San Bernardino County; or (3) commence a new action in some other county. We will know more about the attitude of the Judge in San Bernardino County after a September 14, 2011 hearing presently scheduled in that case, and the recommendations herein should be considered preliminary until after a review of further developments in that case. Any additional action filed in a state court other than Alameda County will face an immediate and costly motion by the Department to move it to Judge Roesch. Moreover, Judge Roesch having issued the preliminary injunction which remains in effect, he is the only Judge (other than the Court of Appeals) in a position to undo that injunction.

Of course, he has previously rejected the argument that federal law might interfere with his injunction against issuing the permits. It is not clear that he would have a different view of AB 120. However, any other court may attempt to duck the lawfulness of the statute by declaring that they are powerless to undo the injunction, and hence cannot offer effective relief sufficient to proceed with the case. It is regrettably the case that the only effective remedy for the miners may ultimately lay on appeal.

For this reason, it is my recommendation that we prepare to present these claims to Judge Roesch, initially through a motion to amend our pleadings in the *Hillman* (injunction) case to assert cross-claims against the Department and State of California, or a separate action if the motion to amend is denied (to be consolidated with *Hillman*). Proceeding before Judge Roesch has the additional advantage of enhancing the credibility of continuing threats to reactivate contempt proceedings in the event the Department should vacillate on completing the EIR and making the requisite certifications.

[1] For technical reasons, it appears that any "taking" claim must first be presented to the state courts.